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State Litigation during the Obama Administration: Diverging Agendas in an Era of Polarized Politics

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Abstract:

Throughout the Obama Administration, state attorneys general (AGs) have collaborated on several high-profile political issues. To get a fuller picture of this contemporary AG activism, this article analyzes AG participation in lawsuits and *amicus curiae* briefs before the U.S. Supreme Court across three presidential administrations. The results suggest that AGs' agendas have increasingly diverged throughout the Obama Administration, reflecting greater vertical conflict between AGs and the federal government as well as horizontal conflict among AGs themselves. Several factors have contributed to this development, including the broader polarization of American politics, intensified activism among Republican AGs, and increased collaborations between AGs and ideological interest groups. Much as with partisan contestation in other venues, these AG conflicts show few signs of abating.

Since President Obama took office in 2009, state attorneys general (AGs) have been among the administration's most persistent foes. Most famously, several AGs initiated legal challenges to the Patient Protection and Affordable Care Act (ACA) only minutes after the president signed it into law, an effort that led to the Supreme

Court limiting the ACA's Medicaid expansion (*National Federation of Independent Business v. Sebelius* [2012]). The ACA litigation was the most prominent state legal challenge to the Obama Administration, but it has been far from the only one. By the end of Obama's first term in office, Republican AGs had filed over seventy lawsuits challenging the administration's policies. Texas AG Greg Abbott, who only half-jokingly described his average day as "I go to the office. I sue the federal government. And then I go home," has himself led twenty-four lawsuits against the Obama Administration at a cost of over \$2.5 million and thousands of hours of staff time (Monro 2012; Weissert 2012; Fernandez 2013). Meanwhile, the federal Department of Justice has tangled with its state counterparts in a series of lawsuits involving immigration policy and voting rights, and partisan AG coalitions have been involved in several high-profile lawsuits pertaining to politically controversial issues, including same-sex marriage, gun control, and abortion.

These activities are of interest to federalism scholars because AGs' position in state government grants them an important avenue through which to influence national policy. Most AGs have considerable autonomy when it comes to developing their state's official position in litigation, which includes participation as both direct parties and as *amicus curiae* ("friends of the court"). Further, forty-three of the nation's AGs are elected statewide separately from the governor or other state elected offices, empowering most of them with considerable political independence.¹ AGs have taken advantage of this institutional autonomy to become involved in several high-profile legal and political issues. As the ACA litigation illustrated, these activities can be a powerful form of "bottom-up federalism" that acts as a form of pushback on the federal government (Gamkhar and Pickerill 2012).

Relying upon an analysis of an original dataset of AG activity in the U.S. Supreme Court, this article examines trends in contemporary AG activism. Specifically, I examine AGs' participation in lawsuits and on *amicus* brief filings in the Supreme Court from 1993 to 2013 to determine the extent of AG conflict and cooperation during the Obama Administration and the two preceding presidential administrations. This examination suggests that AG activity during the Obama Administration has become increasingly polarized, resulting in greater *vertical* conflict between the states and federal government as well as *horizontal* conflicts among the AGs themselves. While bipartisan

collaboration still occurs on some issues, Democratic and Republican AGs are pursuing increasingly divergent agendas across a wide range of policy domains.

The article proceeds as follows. I begin with a discussion of AGs and contemporary federalism, raising the question of how broader trends in American federalism might have affected the activities of the AGs. I then examine an original dataset of AG activism across three presidential administrations, finding a sharp increase in both vertical and horizontal conflicts during the Obama Administration. Third, I take a closer look at specific areas of AG conflict and cooperation since 2009. In this section, I identify two key trends in state litigation: a dramatic increase in Republican AG activism as compared to the last Democratic presidential administration and increasing divergence in the ways AGs define the "state interests" they are tasked with representing. The fourth section suggests that the intensification of AG partisanship has several sources, including the broader polarization of the political system, the significant increase in both the quantity of and activism among Republican AGs, and increased collaborations between AGs and ideological interest groups. I conclude with suggestions about possible future research on contemporary AG activism.

Contemporary Federalism, Polarization, and State Attorneys General

Contemporary American federalism has been described as "more chaotic, complex, and contentious than ever before" (Bowling and Pickerill 2013: 315). States have resorted to several methods to complicate and push back against federal policy, including turning down federal grants (Nicholson-Crotty 2012), refusing to implement elements of "cooperative" federal programs such as Medicaid (Tavernise and Gebeloff 2013), and even threatening to nullify federal law (Schwartz 2013).

At the heart of what Bowling and Pickerill (2013) call "fragmented federalism" is an intensification of partisanship and polarization throughout the entire American political system. Members of Congress are as polarized now as they have ever been in American history, and issue differences between Democratic and Republican voters are at all-time highs (Pew Research Center 2012). While until quite recently state politics was viewed as being more conducive to

compromise and bipartisanship (Krane 2007; Brownstein and Czekalinski 2013), state-level polarization has become much stronger. Following the 2012 elections, one party held the governorship and both chambers of the legislature in thirty-seven states, a marked departure from previous patterns of divided government (Balz 2013). This unified governance has enabled states to pursue widely divergent agendas on a host of issues.

To what extent has this increased partisanship affected recent activities of AGs? On the one hand, it would appear that increased cohesion, rather than divergence, best describes contemporary AG activism. Beginning during the last two decades of the twentieth century, AGs increasingly coordinated across state lines to intervene in national politics. Several scholars have examined multistate collaboration in the Supreme Court, where states have become the second most active litigator after the federal government (Mather 2003; Lindquist and Corley 2013). AGs also became active in filing multistate *amicus curiae* briefs on behalf of their states (Provost 2011; Waltenburg and Swinford 1999; Kearney and Merrill 2000; Nicholson-Crotty 2007). Further, as Colin Provost has documented, AGs have actively coordinated their efforts to bring consumer protection lawsuits against prominent national corporations (Provost 2003; Provost 2006). In February 2012, for example, all of the nation's AGs signed a \$26 billion agreement with the six largest national banks, concluding their investigation of the mortgage crisis of the late 2000s (Schwartz and Dewan 2012).

On the other hand, contemporary AG activities appear to reflect fragmented federalism in several key ways. First, AGs have engaged in a considerable amount of *vertical* conflict by challenging the federal government and pursuing policy goals opposite to those sought by their federal counterparts in the Department of Justice. The use of judicial avenues to challenge the federal government is nothing new,² but AGs became more willing to coordinate their challenges against federal policy during the Reagan Administration (Clayton 1994). AGs became especially active during the George W. Bush Administration, when several criticized "regulatory gaps" in the Bush Administration's approach to prescription drug regulation, antitrust enforcement, financial regulation, and prevention of climate change. In addition to using settlements with national industries to help fill these alleged "regulatory gaps," AGs also sued federal agencies in attempts to force

them to take a stronger regulatory approach (Scheberle 2005). This vertical conflict has been very much present during the Obama Administration, perhaps best exemplified by AG-led lawsuits challenging the Affordable Care Act.

Also important have been two forms of *horizontal* conflict involving disputes among the AGs themselves. First, AGs have sometimes opposed one another directly in court. This can occur when policy choices in some states produce spillover effects affecting the interests of other states (Zimmerman 2011) or when AGs otherwise disagree with one another about the proper outcome of a legal dispute. Second, partisanship can generate additional conflict among AGs. In addition to most AGs having independence from other state-level political actors, all of them are either members of the Democratic or Republican Party. As other scholars have demonstrated, this partisanship can be an important part of AG decision-making (Spill, Licari, and Ray 2001; Provost 2011).

State Litigation across Three Presidential Administrations

Previous scholarship on AGs describes these actors as taking on more activist roles over time, but have any new trends in AG activism emerged during the Obama Administration? To help identify possible trends in AG conflict and cooperation, I examined multistate AG activism in the U.S. Supreme Court across the three most recent presidential administrations. While participation in lawsuits before the nation's highest court is only one of several forms of contemporary AG activism,³ it is one of the most important ways in which AGs seek to have a national impact on public policy. This participation primarily occurs in one of two ways: either as direct litigants or as *amicus curiae*. Both of these avenues allow AGs to determine the official position of their states in what are often high profile legal and political disputes.

My data collection included all cases from 1993 to 2013 in which multiple AGs filed a brief to the U.S. Supreme Court as either direct litigants or *amici*.⁴ This included AG participation during both the *certiorari* and merits stages of a case. To collect this data, I employed a search of the U.S. Supreme Court Briefs database available through Lexis-Nexis.⁵ Because my interest is in the number of cases involving

AG participation rather than the sheer number of AG briefs filed, I counted multiple briefs filed in one case only once for the purpose of this analysis. Therefore, cases in which states first filed a brief at the *certiorari* stage and again during the merits stage were counted only once.⁶ This search resulted in 845 Supreme Court cases from 1993 through 2013 attracting multistate AG participation.⁷

After identifying each of the cases, I then determined whether each case involved vertical conflicts (between the states and federal government) or horizontal conflicts (among the states themselves). Cases were coded as involving vertical conflicts if the federal government, typically through the Department of Justice, participated in the case by opposing the interests of any of the AGs involved. I also determined the prevalence of two types of horizontal conflicts among AGs. The first were cases in which groups of AGs engaged in direct conflict by taking opposing positions in the case. The second group of cases included those that, while not involving direct conflicts among AGs, involved clear partisan behavior by either Republican or Democratic AGs. For the purposes of this analysis, I considered AG briefs "partisan" in nature if Republican or Democratic AGs constituted at least 80 percent of the AGs participating in the brief.⁸

The results suggest a strong upward trend in both vertical and horizontal conflict during the Obama Administration. Figure 1 illustrates the number of cases involving vertical conflict between AGs and the federal government. Figure 2 includes the number of horizontal conflicts in which AGs either opposed one another directly or collaborated only on partisan briefs.

[Figure 1 here]

[Figure 2 here]

The large spike in these conflicts during 2013 reflects that many of the cases that had been percolating in the lower courts finally reached the Supreme Court during this year. Overall, AGs opposed the federal government's position in fifty-nine Supreme Court cases from 2009 through 2013, which already nearly surpasses the number of such cases during the entire Clinton Administration and is likely to soon exceed the total number during the George W. Bush years.⁹ Similarly, horizontal conflicts among AGs have also intensified. Seventy-five cases have involved partisan participation among AGs during the Obama Administration, and AGs have directly opposed each other in twenty-one cases during this time. Both of these totals already surpass

the totals for the eight years of the Clinton presidency and are close to the totals for the entire George W. Bush Administration.¹⁰

AG Conflicts and Cooperation during the Obama Administration

Which issues have generated the most intergovernmental conflict and which areas still generate cooperation among the AGs? To help answer this question, I categorized the cases in the dataset based on the nature of the conflicts involved. The most contentious set of cases were those involving both vertical and horizontal conflicts, indicating divisions between AGs and the federal government as well as among AGs themselves. Other cases involved only one type of conflict: either horizontal conflicts among AGs in cases not involving the federal government or vertical conflicts in which states provided a united front in opposition to the federal government. A final category of cases involved cooperation rather than conflict, including cases in which AGs formed bipartisan coalitions on a single side of the case. Many of these cases also involved AG cooperation with the federal Department of Justice.

Table 1 indicates the frequency of each of these four groups of cases during the Obama Administration.

[Table 1 here]

Below, I provide a brief overview of the sorts of issues involved in each of the four basic forms of conflict and cooperation represented in Table 1. To assist in this effort, I turned to the U.S. Supreme Court database to collect information about the types of issues involved in each of the 845 cases in the dataset.¹¹

Areas Involving both Vertical and Horizontal Conflicts

The greatest amount of intergovernmental conflict occurs when divisions exist both between the states and the federal government as well as among the states themselves. This category of cases has grown considerably over time. About 18 percent of all Supreme Court cases attracting AG participation during the Obama Administration fell into this category, as compared to only 6 percent during the Clinton Administration and 12 percent during the George W. Bush Administration. Further, this category described over 37 percent of the

cases in 2013. These cases have tended to involve partisan conflict over federal statutes and regulations, though they have also involved constitutional disputes concerning controversial state laws.

The most prominent of the cases in this category occurring during the Obama Administration have involved the Affordable Care Act. An all-Republican coalition of AGs initiated the challenges to both the Medicaid expansion and the individual mandate provisions of the ACA that ultimately led to *NFIB v. Sebelius* (2012). Another all-Democratic coalition of AGs opposed these efforts by filing *amicus* briefs in support of these ACA provisions. Private party challenges to the ACA's contraceptives mandate likewise attracted partisan AG *amicus* participation on both sides of the issue (*Conestoga Wood Specialties Corp. v. Sebelius* [cert. granted]; *Sebelius v. Hobby Lobby Stores* [cert. granted]).

Environmental policy, particularly concerning air pollution regulation, has also generated considerable vertical and horizontal conflict since 2009. Much of the litigation has focused on the regulatory fallout from the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency* (2007) and subsequent Obama Administration actions to combat climate change. When the EPA announced in December 2009 that carbon dioxide was a pollutant that endangered human health, several Republican AGs filed suit to overturn the finding (Tresaugue 2010; Cook 2010). This spurred sixteen other AGs, all but one Democrats, to intervene in these cases on behalf of the Obama EPA's position and against their Republican AG counterparts (Massachusetts Attorney General's Office 2010). The EPA's subsequent attempts to implement climate change regulation have also featured sharp conflicts among Democratic and Republican AGs (*Utility Air Regulatory Group v. EPA* [cert. granted]). Cases involving environmental issues other than climate change have likewise generated both vertical and horizontal conflicts, including acid rain control (*EPA v. EME Homer City Generation* [cert. granted]), regulation under the Clean Water Act (*Sackett v. EPA* [2012]; *Mingo Logan Coal Co. v. EPA* [cert. petition pending]), forest conservation (*Wyoming v. U.S. Dept of Agriculture* [cert. denied]), and federal approval of increased ethanol blending in gasoline (*Grocery Manufacturers' Association v. EPA* [cert. denied]).

Several high profile disputes over controversial social issues also fall into this category of intense intergovernmental conflict. Partisan

coalitions of Republican AGs have opposed the Obama Administration's position in cases involving gay rights (*Hollingsworth v. Perry* [2013]; *United States v. Windsor* [2013]), immigration (*Arizona v. United States* [2012]), gun control (*Abramski v. United States* [cert. granted]; *Montana Shooting Sports Association v. Holder* [cert. denied]), buffer zones around abortion clinics (*McCullen v. Coakley* [cert. granted]), and voting rights (*Shelby County v. Holder* [2013]; *Arizona v. Inter-Tribal Council of Arizona* [2013]). Several of these cases have prompted partisan coalitions of Democratic AGs to counter-mobilize in opposition to their Republican colleagues.

Areas Involving Only Horizontal Conflict

Another set of cases, while not involving the federal government, has nevertheless generated significant horizontal conflict among the AGs. These cases, representing 17 percent of all cases attracting AG involvement during the Obama Administration, tend to involve the constitutionality of highly contentious state laws. Affirmative action policies provide one prominent example. Partisan groups of AGs filed opposing briefs in a case involving whether Michigan's state constitutional ban of affirmative action violates the Equal Protection Clause of the U.S. Constitution (*Schuette v. Coalition to Defend Affirmative Action* [cert. granted]). In *Fisher v. University of Texas* (2013), a group of nearly all Democratic AGs filed a brief in favor of the constitutionality of the university's affirmative action program, which followed Republican Texas AG Greg Abbott's refusal to defend the university's race-conscious program in the Supreme Court (Von Spakovsky 2013). Sharp horizontal conflicts have also been prominent in cases concerning other hot-button issues such as gun control (*McDonald v. Chicago* [2012]), abortion (*Horne v. Isaacson* [cert. denied]), and religion (*Christian Legal Society v. Martinez* [2010]; *Salazar v. Buono* [2010]; *Town of Greece v. Galloway* [cert. granted]).

This category of cases has also involved AG disagreement on issues pertaining to class actions and private litigants' access to the courts. Two of the most important class action cases in recent years both featured partisan groups of AGs taking opposing positions in the litigation. In *Standard Fire Insurance Co. v. Knowles* (2013), which dealt with the right of a company sued by class action litigants to

remove the case from state to federal court, an all-Republican AG coalition filed an amicus brief in favor of the company, raising concerns about "the use of novel class-action procedures to abridge the rights of their citizens" (Brief of Alabama, et al. 2012). Meanwhile, three Democratic AGs filed a brief on the opposing side, arguing that removing the class action to federal court would harm "the ability of their citizens to adjudicate controversies within their own jurisdiction" (Brief of Arkansas, et al. 2012). Similarly, partisan groups of AGs took opposing positions in *AT&T Mobility v. Concepcion* (2011), which involved whether the Federal Arbitration Act preempted state contract law prohibiting the use of certain arbitration clauses in consumer contracts.

Areas Involving Only Vertical Conflict

A third category of cases involves those in which states present a united front in opposition to the federal government. While this type of case may be the first to come to mind when discussing intergovernmental conflicts, they in fact constitute a small and shrinking percentage of intergovernmental conflict. This category represented about 15 percent of all cases in the dataset during the Clinton and George W. Bush Administrations, but described only 9 percent of the cases during the first five years of the Obama Administration. Especially common in this grouping of cases were those involving federal preemption and sovereign immunity.

In *National Meat Association v. Harris* (2012), for example, a bipartisan AG coalition joined with California AG Kamala Harris in defending a state law regulating the treatment of animals in slaughterhouses. The Obama Administration opposed the states' position, arguing that the Federal Meat Inspection Act expressly preempted California's law. Other preemption cases have also involved bipartisan AG coalitions opposing the federal government's position (*Wos v. E.M.A.* [2013]; *Montana v. U.S. Department of the Treasury* [cert. denied]). Sovereign immunity cases, which involve whether states can be sued without their consent, have also involved bipartisan groups of AG aligned against the United States' position (*Sossamon v. Texas* [2011]; *Virginia Office for Protection and Advocacy v. Stewart* [2011]).

Other federalism-related issues have generated vertical-only conflicts in the Supreme Court, such as whether state action is immune from federal antitrust law (*North Carolina Board of Dental Examiners v. FTC* [cert. granted]) and whether a state can refuse to transfer a prisoner to the custody of the United States (*Chafee v. United States* [cert. denied]). The United States and a bipartisan group of AGs also disputed the proper interpretation of a federal civil rights statute in the context of employment discrimination (*University of Texas Medical Center v. Nassar* [2013]).

Areas Involving Intergovernmental Cooperation

While vertical and horizontal AG conflicts have grown increasingly prominent throughout the Obama Administration, intergovernmental cooperation remains important. Indeed, over half (56 percent) of the cases from 2009 to 2013 involved neither vertical nor horizontal conflict, though only 36 percent of the cases in 2013 fell into this category.

The largest area of intergovernmental cooperation involved criminal procedure issues. This area is consistently the single largest issue area attracting multistate AG participation, as about a quarter of all of the cases each year from 1993 through 2013 have involved criminal procedure issues. In addition, these cases have involved the least amount of AG conflict. AG participation in criminal procedure cases tends to be bipartisan, and participating AGs rarely oppose the federal government's position in these cases. Of all the cases designated by the U.S. Supreme Court Database as "Criminal Procedure" cases, only about 9 percent involved either partisan AG participation or direct conflicts among federal and state prosecutors. Even this small percentage likely overstates conflict, however, since the Supreme Court Database includes Second Amendment gun rights cases as part of this general category. Removing these cases from the total drops the amount of conflict to less than 7 percent of the cases.

In addition to the cooperation present in criminal procedure cases, AGs have also worked on a bipartisan basis to defend their own ability to bring litigation in the name of their states. In *Mississippi v. AU Optronics* [2014], nearly all of the nation's AGs signed on to a brief supporting Mississippi AG Jim Hood's antitrust lawsuit against several electronics manufacturers. Hood had filed the lawsuit in state court,

but the manufacturers argued that the Class Action Fairness Act of 2005 (CAFA) required that the AG's lawsuit be removed to federal court. The AGs' ultimately successful argument was that CAFA was not meant to limit consumer protection lawsuits filed by AGs. The AGs' cooperation in *AU Optronics* mirrored previous bipartisan AG efforts to fight attempts to limit their powers to litigate in the name of their state, both in the Supreme Court (*Cuomo v. Clearing House Association* [2009]) and in other venues.¹² Bipartisan cooperation in this area contrasts with the previously mentioned partisan conflict among AGs when the issues involve the ability of *private* litigants to sue.

Finally, while this article focuses on AG participation in Supreme Court cases, it is important to note that out-of-court settlements with national corporations have also tended to attract strong bipartisan support from most or all of the nation's AGs. In addition to the \$26 billion foreclosure settlement noted earlier, AGs have reached dozens of consumer protection and antitrust settlements with pharmaceutical companies, financial firms, and others (Provost 2010; Nolette forthcoming).

The existence of intergovernmental cooperation in these areas, however, does not necessarily mean that partisan concerns are irrelevant. Of the sixty-three criminal procedure cases during the Obama Administration involving a multistate brief, for example, a Republican AG served as the lead author of the brief in forty-three (68 percent) cases. This is consistent with previous scholarship finding that Republican AGs were more likely to initiate *amicus* briefs in criminal procedure cases between 1990 and 2001 (Provost 2011), suggesting that criminal procedure issues continue to be a higher priority for Republican AGs. Further, even when they ultimately join legal settlements with corporations, Republican AGs may be more likely to harbor concerns about the impact of this litigation on business interests. Republican Oklahoma AG Scott Pruitt, for example, initially criticized the 2012 national foreclosure settlement as "greatly overreach[ing] the authority of state attorneys general" (Oklahoma Office of the Attorney General 2012). Previous scholarship on tobacco litigation, which found that Republican AGs were more hesitant to join the litigation out of concerns about its impact on the tobacco industry (Spill, Licari, and Ray 2001), suggests that Pruitt's concern is not an isolated one.

Partisan Conflict and the Definition of "State Interests"

The existence of vertical and horizontal AG conflict is not an entirely new development. AGs took on a more regularized and coordinated activist role during the Reagan Administration by challenging the administration's priorities on environmental, consumer protection, and antitrust issues (Clayton 1994). Partisan splits were apparent in several cases during the George W. Bush Administration, including the litigation campaign by former New York AG Eliot Spitzer and other Democratic AGs to force the Bush Administration to address climate change (*Massachusetts v. EPA* [2007]).

Nevertheless, in addition to the intensification of these conflicts, two new developments are particularly worth highlighting. First, Republican AGs have become particularly active in initiating challenges to federal policy. In one sense, this is not particularly surprising – after all, Democratic AGs aggressively challenged the Bush Administration in several policy areas, and Republican AGs now have the opportunity to push back against an administration of the opposite party. Nevertheless, it is notable that compared to the last time a Democrat occupied the White House, Republican AGs are now far more active in challenging the federal government and pursuing agendas quite different from their Democratic counterparts. In nearly all of the cases (96 percent) in which Republican AGs took positions opposing the Clinton Administration, they did so as part of a bipartisan AG coalition. In fact, of all of the partisan briefs AGs filed during the Clinton Administration, most involved Democratic AGs taking a position opposing the administration. Only five cases during the entire Clinton Administration featured multiple Republican AGs collaborating on a partisan brief,¹³ compared to *forty-nine* during the first five years of the Obama Administration alone. Following a 2012 press conference of nine Republican AGs who highlighted their various lawsuits against the Obama Administration, Texas AG Greg Abbott remarked, "There seems to be, in addition to the size, an intensified cohesion and collegiality among the [Republican] AGs. Part of it is based on personality. Part of it is based on sense of purpose" (Biskupic 2012). These statistics bear out Abbott's comment.

A second important development has been AGs defining their states' interests in increasingly partisan terms, leaving fewer cases in

which there are clearly discernible and unified "state interests" conflicting with those of the federal government. Instead, AGs have alternated between broadly describing "state interests" as either the necessity of protecting state policy autonomy or upholding the interests of their individual citizens against government (state or federal) overreach, depending on the nature of the underlying policy dispute. The lack of consistency in these arguments suggests that AGs are using their structural independence and nearly exclusive control of over shaping their state's position in litigation to pursue their own, and increasingly partisan, conceptions of good public policy.

Consider AGs' involvement in several recent high profile cases in the Supreme Court. In *Hollingsworth v. Perry* and *U.S. v. Windsor*, two prominent gay rights cases decided in 2013, separate Democratic and Republican AG coalitions filed *amicus* briefs taking an opposite position from one another. While both groups of AGs claimed that their status as their states' legal representatives gave them an interest in these cases, the AGs' respective positions appeared to be more about the policy merits of the cases and less about federalism. While Massachusetts AG Martha Coakley and her fellow Democratic AGs argued in *Windsor* that the federal Defense of Marriage Act "represents an unprecedented intrusion into an area of law that has always been controlled by the states," she simultaneously led a Democratic coalition in *Hollingsworth* urging a federal court to intervene and strike down California's Proposition 8 banning same-sex marriages (Massachusetts Attorney General's Office 2013). Meanwhile, a Republican AG coalition claimed that striking down Proposition 8 would "undermine the ability of states to define and regulate marriage" (Brief of Indiana, et al. 2013a), but on the same day many of the same Republican AGs filed a brief in *Windsor* defending a federal statute regulating an area of family law that had traditionally been under state control (Brief of Indiana, et al. 2013b).

Recent cases concerning abortion, gun control, and affirmative action illustrates a similar dynamic of AGs taking positions in favor of limiting state policymaking authority. In *McCullen v. Coakley*, a challenge to Massachusetts's thirty-five foot "buffer zone" around abortion clinics, twelve Republican AGs filed an *amicus* brief urging the Court to strike down the state law because the law "exempts speakers likely to express *favorable* views about abortion" (Brief of Michigan, et al. 2013). Similarly, a group of AGs urged the Court to strike down a

local law in *McDonald v. Chicago* (2010), involving a challenge to Chicago's strict gun control law. Their interest in the case, they claimed, flowed from the AGs' status as fundamental "guardians of *their citizens'* constitutional rights" (emphasis added). The AGs, in other words, advocated for increased federal authority over state policymaking, all in the name of ensuring that "millions of Americans" are not "deprived of their Second Amendment right to keep and bear arms" (Brief of Texas, et al. 2009). This trend of AGs arguing in favor of a result that would effectively constrain state authority has also appeared in recent cases such as *Schuette v. Coalition to Defend Affirmative Action*, which featured a group of Democratic AGs opposing Michigan AG Bill Schuette's defense of the state's constitutional ban on affirmative action (Brief of California, et al. 2013).

This dynamic is also at work behind another recent trend of AGs refusing to defend their own state laws against constitutional attack. Texas AG Greg Abbott's refusal to defend his state's affirmative action policy before the Supreme Court in *Fisher v. University of Texas* is one example. Other recent examples include Pennsylvania's AG declining to defend the state's Voter ID law on appeal (Murphy 2014) and the California AG's decision to refrain from defending the state's ban on gay marriage (Office of the California Attorney General 2013). After taking office following conservative AG Ken Cuccinelli's failed bid for Virginia's governorship, Democratic AG Mark Herring announced that federal courts ought to strike down his own state's gay marriage ban (Williams and Gabriel 2014). Several observers, including other AGs, have criticized these "litigation vetoes" as examples of AGs allowing ideological concerns to trump constitutional duties to defend state laws (Suthers 2014).

The increasing polarization of AG activism has also been apparent in growing conflicts between AGs and other state institutions. Beginning shortly after AGs initiated the ACA challenges in federal district court, for example, several governors and state legislatures attempted to influence their AGs' decisions either to join or refrain from joining the ongoing litigation. Idaho's state legislature became the first of several to pass legislation purporting to require the AG to file a lawsuit against the ACA (J. Miller 2010), and the Georgia legislature even introduced articles of impeachment against the state's Democratic AG for refusing to join the litigation (Brown 2010). The Republican governors of Nevada and Mississippi both announced that

they were hiring special outside counsel to represent their states after their states' Democratic AGs had declined to do so (Wheeler 2010). Meanwhile, Democratic legislators criticized their states' Republican AGs for joining the challenge to the ACA. In Washington State, for example, the Democratic legislature moved to reduce Republican AG Rob McKenna's budget (Brunner 2010) and Seattle's city attorney initiated a lawsuit seeking to force McKenna's withdrawal from the litigation (La Corte 2010).

The Sources of Intensifying AG Polarization

What has contributed to the intensification of polarization among the AGs? Why have Republican AGs, who as a group were relatively muted the last time that a Democratic occupied the White House, taken on more activist roles? Below, I suggest four key contributions to these trends.

First, and most directly, AG activism reflects intensifying polarization apparent elsewhere in the political system. While polarization increased after Republicans captured control of Congress in 1994, there has been a considerable surge in polarization since 2000 (Pew Research Center 2012). This intensified polarization throughout the political regime has affected various institutions of government, including the Supreme Court (Clayton and McMillan 2012). State governments have been no exception, as state-level political conflicts increasingly mirror national-level partisan splits. As late as George W. Bush's second term, one could speak of a distinction between the polarized national environment and a less polarized state-level politics (Krane 2007). Reflecting a similar development among governors and other state-level institutions, however, the polarization on the national level appears to have trickled down to the AGs.

Second, while groups of mostly Democratic AGs had challenged national-level policies adopted by Republicans during the Reagan and George H.W. Bush administrations, activism among Democratic AGs reached new heights at the end of the 1990s and into the 2000s. This, in turn, spurred Republican AGs to counter-mobilize. The key event was the tobacco litigation of the late 1990s, which was initiated by liberal AGs such as Louisiana's Michael Moore and Minnesota's Hubert Humphrey.¹⁴ All of the nation's Republican AGs eventually joined settlements with the tobacco industry, but not without criticism. Most

prominent among the critics was Republican Alabama AG William Pryor, who charged that the tobacco litigation was an illegitimate attempt to achieve "regulation through litigation" (Pryor 2001). Shortly after the tobacco settlement, Pryor helped establish the Republican Attorneys General Association (RAGA). Democrats then founded the Democratic Attorneys General Association in 2002, which, like RAGA, serves not only as a way to elect more party members but also as a forum to discuss partisan policy priorities. This development was a significant departure from AGs' traditional practice of meeting only under the auspices of the National Association of Attorneys General and regional non-partisan groups (Curriden 1999). This development mirrors similar trends on the state level, where the Republican and Democratic Governors Associations have become increasingly important relative to the bipartisan National Governor's Association (Balz 2013).

The third major development contributing to intensifying polarization among the AGs is that Republicans have had much more success in AG elections. Democrats had long dominated this position at the state level, maintaining a significant majority of the AG positions for several decades.¹⁵ The Democrats' high point followed the 1992 elections when they held thirty-eight of the fifty AG positions, but the party continued to hold a strong majority of the nation's AG seats throughout the Clinton and George W. Bush Administrations. Since the start of the Obama Administration, however, Republican AGs have seen an influx of new members to their ranks. Reflecting the broader decline of divided partisan control of political institutions on the state level (Kurtz 2013), Republicans began winning AG elections in relatively conservative states long represented by Democratic AGs. Following Louisiana AG Buddy Caldwell's switch to the Republican Party in early 2011, Democrats no longer held a majority of the AG seats for the first time in decades.

A fourth development is AGs' increasing willingness to collaborate on lawsuits with ideological interest groups. Republican AGs' ACA lawsuits, for example, operated in tandem with several lawsuits by private employers and conservative advocacy groups (Goldstein 2011). The National Federation of Independent Business held a press conference in Florida AG Bill McCollum's office announcing that the conservative "voice of small business" was joining the AGs' lawsuit in May 2010 (Sack 2010). One of the conservative litigators

the states retained to represent their interests in their challenge to the ACA, David Rivkin, has served as outside counsel to conservative AGs on other cases challenging the Obama Administration as well (Price 2011). Republican AGs' use of outside counsel mirrors Democratic AGs' alliances with liberal advocacy groups and private class-action attorneys in litigation aimed at influencing national policy. Massachusetts's lead brief in *Massachusetts v. EPA*, which was authored by Georgetown Law professor and environmental advocate Lisa Heinzerling, came together only after close collaboration among representatives of the twenty-nine state and environmental advocacy group plaintiffs aligned against the EPA (Nugent 2007). AGs have also worked in tandem with a coalition of various unions, progressive advocacy groups, and class action attorneys in litigation seeking greater regulation of pharmaceutical companies (Nolette forthcoming).

The alliances among ideological litigators and AGs reflects the broader polarization that has occurred in the legal arena, particularly as conservatives have exhibited greater willingness and capacity to use the courts to achieve conservative social policy goals (Teles 2010). It also reflects the benefits of collaboration for both sides. For the AGs, collaborating with outside groups helps the states expand the resources available to engage in lengthy, large-scale litigation campaigns. In the ACA case, for example, the NFIB served as a valuable litigation ally for the AGs, providing significant resources for the lawsuit. The organization's financial records indicated that it spent nearly \$1.2 million on the lawsuit in 2010 alone (Needleman and Loten 2012). These collaborations also benefit the AGs' advocacy group and private litigator allies in part because AG participation helps add legitimacy and publicity to the political concerns underlying their litigation. The AG coalition aligned against the ACA, for example, brought considerable institutional authority to the litigation. Because they could claim that the ACA implicated state interests, AGs also brought another valuable resource along with them: the ability to get into court. In this sense, collaborating with AGs grants advocacy groups easier entry to court by adding an element of standing that they alone may not be able to claim.

Conclusion

The analysis in this article suggests that the rise of polarized politics elsewhere in the political system has been apparent in AG activism as well. Vertical and horizontal AG conflicts reached unprecedented levels during the Obama Administration as percolating challenges to federal policies reached the Supreme Court. This level of conflict is likely to continue for the remainder of Obama's presidency as several pending challenges reach the Court, such as a significant AG-led challenge to the Dodd-Frank financial regulations (Witkowski 2013).

Scholars have paid greater attention to AGs in light of their recent activism, but several potential avenues for work on these important state-level actors remain. While this article focuses on AG interventions in the U.S. Supreme Court, examining other AG activities would help get a more comprehensive picture of trends in AG decision-making. AGs play an important role in state policy development, such as issuing opinions interpreting state law and providing guidance to state agencies. They also attempt to influence the judicial branch in state and lower federal courts, and have sought to influence Congress and the federal executive branch through organized sign-on letters and methods besides litigation. Further examining these areas of AG cooperation and conflict can serve to shed light on the nature of "state interests" in contemporary American federalism. Scholars might also examine the extent to which AGs are polarized relative to the electorates they represent, building upon existing work in this area pertaining to AGs and state-level actors generally (Provost 2010; Lax and Phillips 2011).

Three additional areas of inquiry would be particularly fruitful. First, we know that AG litigation can have an important impact on national policy, as demonstrated by the Supreme Court adopting the AGs' Medicaid arguments in *NFIB v. Sebelius* (2012). Future work might build upon existing studies of AGs' impact on national policy (Waltenburg and Swinford 1999; Nicholson-Crotty 2007) to examine how AG activism has shaped American political development. Second, the emergence of collaborations between AGs and private ideological interest groups appears to be a particularly important trend. This article suggests that both AGs and interest groups benefit from these

collaborations, but little is known about how AGs have actually worked with private groups in their litigation campaigns.

Finally, more work ought to explore AGs' institutional development over time. Previous scholarship has noted the rapid increase in AG capacity and professionalization among AGs beginning in the 1970s (Waltenburg and Swinford 1999). More recently, several AGs have established solicitor general positions in their offices in order to assist in appellate litigation. A majority of AGs now have solicitor general offices, most of which were added in the late 1990s and into the 2000s (B. Miller 2010). Further, Congress has contributed to AGs' development by providing grants for state-level enforcement and allowing AGs to enforce federal law (Lemos 2011). Closer examination of these contributions to AGs' institutional development can shed light on why AGs have become such an important political player on the national stage, and may help to explain patterns of activism that have emerged in contemporary AG practice.

AGs have few incentives to abandon the use of collaborative litigation as a way to influence national policy. Multistate litigation has simultaneously been a way for AGs to collectively pursue a common policy agenda and individually raise their own political profiles (Provost 2003; Kam 2012; Catanese 2013). The emergence of intensified activism among Republican AGs, which followed in the footsteps of Democratic AG activism during the George W. Bush Administration, signals an entrenchment of collaborative AG litigation as an avenue for partisan contestation. This suggests that these important state actors will likely continue to engage in law-based activism well after Obama leaves office.

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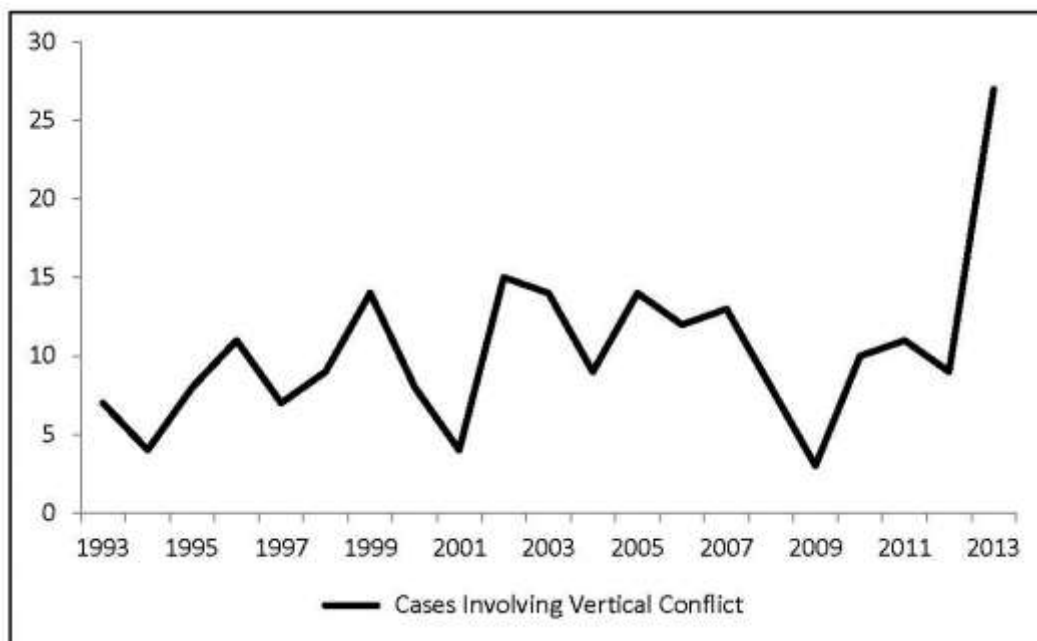
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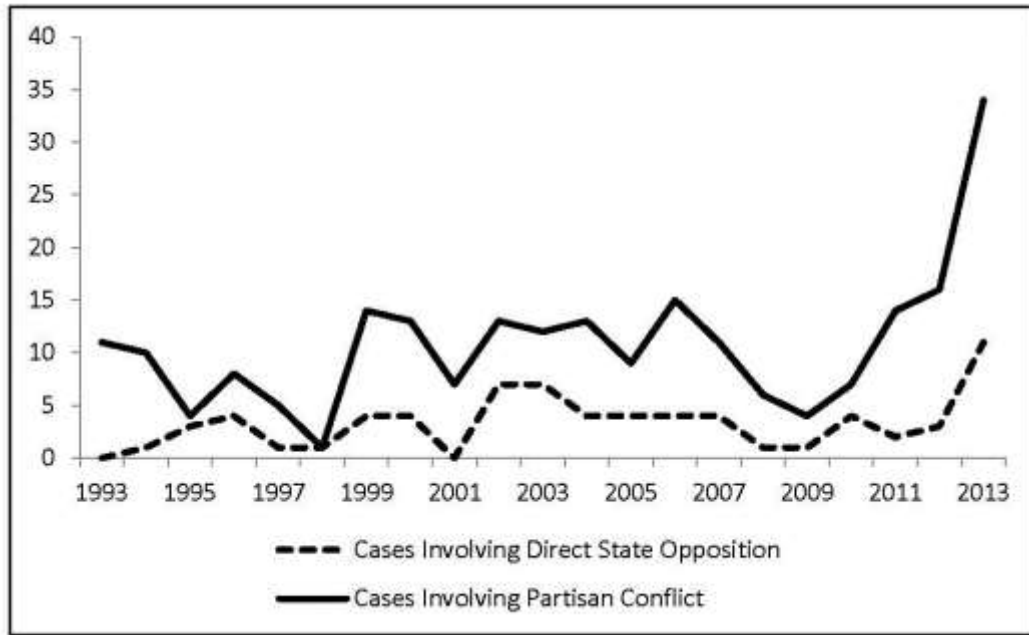
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Figure 1 Number of multistate cases involving vertical conflicts, 1993-2013



Source: Author's calculations from data collected on Lexis-Nexis.

Figure 2 Number of multistate cases involving horizontal conflicts, 1993-2013



Source: Author's calculations from data collected on Lexis-Nexis.

Table 1 Frequency of vertical and horizontal AG conflicts, 2009-2013

	Vertical Conflict	Horizontal Conflict
	Present	Not Present
Present	18%	9%
Not Present	17%	56%

Notes:

- ¹ The governor appoints the AG in Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. The state legislature and state supreme court appoint the AGs in Maine and Tennessee, respectively.
- ² For example, AGs from southern states litigated against several federal civil rights policies during the 1960s (e.g. *South Carolina v. Katzenbach* [1966]).
- ³ For example, out-of-court multistate settlements with corporations are also a key way in which AGs can pursue political agendas. AGs also engage in activism in other venues, including lobbying

legislatures and issuing opinions guiding executive branch interpretation of state law.

- ⁴ Just over half (51 percent) of these cases involved one or more AGs serving as direct parties to the litigation, while the remainder involved solely *amicus* participation. Note that this dataset does not include cases involving participation from only one AG, since single-state cases tend to involve state-specific issues different from the more nationally important issues involved in multistate cases. I also excluded the small handful of original jurisdiction cases during these years. While these cases involve state conflicts, they also typically involve only state-specific policy issues (e.g. disputes over state borders). Nevertheless, because of the small number of these original jurisdiction cases, including them would make little difference to the trends identified in Figure 2.
- ⁵ I used the following search string for each year of the study in order to identify briefs filed by AGs: COUNSEL((attorney! w/2 general!) or (state! w/2 attorney!) or "Atty. Gen." or "Attorney Gen." or "Atty. General" or "solicitor general") or (amici pre/1 plural(states)). Because the Lexis-Nexis database includes only a limited number of briefs concerning petitions for *certiorari* in cases that the Court ultimately declines to review, I supplemented this search with a list of such cases provided by the Supreme Court Counsel for the National Association of Attorneys General, Dan Schweitzer.
- ⁶ Additionally, I treated two other sets of cases as only one for the purposes of this analysis: (1) cases in which states filed separate sets of briefs, but on the same side of the case, and (2) cases involving the same legal question that were later consolidated into a single case by the Court.
- ⁷ The vast majority of cases involved wide AGs participation. Over 96 percent of the cases in the dataset involved five or more AGs, and over two-thirds attracted the involvement of at least fifteen AGs.
- ⁸ I chose an 80 percent partisanship threshold because it provides the best balance between cases attracting significant bipartisan support and cases that might have attracted the support of one or two AGs from the opposite party but were nevertheless clearly partisan in nature. However, I also examined the data

using a 70, 90, and 100 percent threshold to determine partisanship. The trends using all of these thresholds were very similar to those identified in Figures 1 and 2.

- ⁹ Vertical conflicts were present in sixty-eight and eighty-nine cases during the Clinton and George W. Bush Administrations, respectively.
- ¹⁰ The seventy-five partisan cases during the Obama presidency compares to sixty-six and eighty-six during the Clinton and George W. Bush years, respectively. Direct horizontal conflicts were present in eighteen and thirty-one cases during the two preceding administrations.
- ¹¹ The U.S. Supreme Court Database is available at <http://scdb.wustl.edu/> (accessed March 11, 2014).
- ¹² For example, the National Association of Attorneys General frequently organizes "sign-on letters" sent to Congress or the executive branch, many of which urge policymakers not to preempt AG powers to enforce state consumer protection and antitrust laws. The list of sign-on letters is available at http://www.naag.org/sign-on_archive.php (accessed March 11, 2014).
- ¹³ The five cases were *Romer v. Evans* (1996) (gay rights), *United States v. Virginia* (1996) (sex discrimination), *Printz v. United States* (1997) (whether Congress can require state officials to regulate handgun purchases), *Norfolk Southern Railway Co. v. Shanklin* (2000) (whether federal law preempts state-level private tort claims), and *Bush v. Palm Beach County Canvassing Board* (2000) (involving the contested 2000 presidential election).
- ¹⁴ Four AGs, including Moore and Humphrey, reached individual state settlements with the tobacco industry separate from the forty-six state Master Settlement Agreement in 1998.
- ¹⁵ Between 1980 and 1994, Democrats controlled no fewer than thirty-one AG positions. Apart from dropping to twenty-nine seats for two years after the 1994 elections, Democrats continued to control at least thirty seats every year until 2005.